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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-195

MUELLER, et al.,
Petitioners

VS.

ALLEN, et al.,
Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS

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MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE

The Baptist Joint Committee on Public Affairs respectfully moves this Court, pursuant to Rule 36.3 of its Rules, for leave to file the accompanying brief amicus curiae in support of petitioners in Mueller v. Allen, No. 82-195.

The consent of the parties to the filing of the attached brief has been sought by the moving party. Petitioners' attorney did not respond to a request for permission to file; respondents, as a matter of policy, withheld their consent. Amicus, accordingly, proceeds under Rule 36.3.

The Baptist Joint Committee on Public Affairs is composed of representatives elected by eight national cooperating Baptist conventions and conferences in the United States. They are: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Seventh Day Baptist General Conference; and Southern Baptist Convention.

The Committee, in part, seeks to

apply the traditional Baptist concerns for religious liberty and proper church-state relations to public affairs. It is the position of amicus that important elements of the establishment clause of the First Amendment are at risk in the case at bar and that Baptist insights will not be presented to the Court unless this brief amicus curiae is considered by this Court.

Therefore, amicus prays this Court grant this motion and consider its accompanying brief which gives the bases and arguments for its support of petitioners' position.

Respectfully submitted,

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QUESTION PRESENTED

May the State of Minnesota permit $500.00 and $700.00 income tax deductions for parents who pay tuition to elementary and secondary schools when the benefits flow overwhelmingly to parents who send their children to sectarian nonpublic schools without offending the "no establishment" clause of the First Amendment?

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BRIEF OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS AS *AMICUS CURIAE*

INTEREST OF THE AMICUS CURIAE

The Baptist Joint Committee on Public Affairs consists of representatives elected by each of eight cooperating Baptist conventions in the United States: American Baptist Churches in the U.S.A.;

Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Seventh Day Baptist General Conference; and Southern Baptist Convention. These Baptist groups have nearly 30 million members and reflect the traditional Baptist concern for proper church-state relations. The Baptist Joint Committee has as one of its mandates the obligation to respond ". . . whenever Baptist principles are involved in, or are jeopardized through, governmental action. . . ." Among Baptists, religious liberty is a fundamental and sacred principle. Religious liberty is also a fundamental legal right protected by the First and Fourteenth Amendments to the Constitution of the United States. It is the opinion of the Baptist Joint Committee on Public

Affairs that the principle of religious liberty and the strictures of the First Amendment have been infringed by §290.09, Subd. 22 of the Minnesota Statutes and by the decision of the United States Court of Appeals for the Eighth Circuit in Mueller v. Allen, _____ F.2d _____ (1982), which is now before this Court on a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Amendment XIV, in part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws.

Minnesota Statutes §290.09 Subd. 22:

Subd. 22. Tuition and transportation expense. The amount he has paid to others, not to exceed $500 for each dependent in grades K to 6 and $700 for each dependent in grades 7 to 12, for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school situated in Minnesota, North Dakota, South Dakota, Iowa, or Wisconsin, wherein a resident of this state may legally fulfill the state's compulsory attendance laws, which is not operated for profit, and which adheres to the provisions of the Civil Rights Act of 1964 and chapter 363. As used in this subdivision, "textbooks" shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship, nor shall it include such books or materials for, or transportation to, extracurricular activities including sporting events, musical or dramatic events, speech activities,

driver's education, or programs of a similar nature.

QUESTION PRESENTED

The decision below raises a fundamental question about the meaning of the clause in the First Amendment: "Congress shall make no law respecting an establishment of religion . . . ." That clause was made applicable to the states by the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296 (1940). The question raised is: Did the U.S. Court of Appeals for the Eighth Circuit err in affirming the constitutionality of Minnesota Statutes §290.09 Subd. 22 which provides state income tax deductions to parents of children in elementary and secondary schools when an overwhelming proportion of such tax benefits flows to parents of children in sectarian nonpublic

schools?

STATEMENT OF THE CASE

The facts of this case are clearly and fully stated in Petitioners' Brief on the Merits. Amicus has nothing to add to the facts as stated so, in the interest of brevity, will adopt that statement as its own.

SUMMARY OF ARGUMENT

The argument may be briefly summarized as follows:

1. The Minnesota Legislature, in passing what is now Minnesota Statutes §290.09 Subd. 22, knew or should have known that the tax relief granted would largely flow to parents of children enrolled in sectarian elementary and secondary schools and, for that reason,

its action did not reflect a secular primary purpose.

2. Minnesota Statutes §290.09 Subd. 22 has the primary or principal effect of advancing religion.

3. Minnesota Statutes §290.09 Subd. 22 results in an excessive entanglement of the state with religion both administratively and through the creation of political divisiveness along sectarian lines.

4. The tax deduction provision of Minnesota Statutes §290.09 Subd. 22, by providing public financial assistance to sectarian parochial schools, constitutes state involvement in compulsory religion.

ARGUMENT

Religious groups operate and control elementary and secondary schools -- usually on a financially sacrificial

basis -- for purely religious reasons. In an article, "Why Catholic Schools?", Father Christopher O'Toole, C.S.C., stated:

> The purpose of the parochial school is to permeate with the Faith and the spirit of the Gospels the total educative process. In a parochial school the teaching of religion, for example, is not simply just another subject to be learned and which is not taught in the public schools. No, the entire curriculum is to move forward in an atmosphere of faith in order to produce a pupil who knows, at least in an elementary way, how to relate all knowledge to its ultimate source--God himself. National Catholic Register, August 6, 1972.

This religious reason for being was noted by this Court in N.L.R.B. v. The Catholic Bishop of Chicago , 440 U.S. 490 (1979). Father O'Toole's description of the religious permeation of the curriculum of Catholic parochial schools also describes the religious permeation of the curriculum of most Protestant schools -- many of which came into existence in part

as a result of the so-called prayer and Bible decisions of this Court. Engel v. Vitale, 370 U.S. 421 (1962); School District of Abington Township v. Schempp, 374 U.S. 203 (1963). The court in Essex v. Wolman, 342 F.Supp. 399 (S.D. Ohio 1972), aff'd, 409 U.S. 808 (1972) stated:

> The basic purpose of denominational education is to foster and maintain the teachings of a denominational religion. The religious aspect of the curriculum must be the principal and dominant reason for the existence of such schools.

This Court has declared, in numerous cases, that the establishment clause of the First Amendment forbids the state either directly or indirectly to support or advance religion. Petitioner has documented that of the Minnesota children attending tuition charging nonpublic schools in the 1979-1980 school year 95.44% attended schools considering themselves sectarian. For the 1978-1979 school year the figure was 96.29%. In

that year the parents of the 820,000 students in both public and nonsectarian private schools claimed $5.2 million in deductions, an average of $6.35 per pupil, while the parents of the approximately 85,000 students in sectarian nonpublic schools deducted a total of approximately $12.57 million for an average deduction of $147.81 per pupil. This represents a ratio of 1:23. It is thus evident that the overwhelming proportion of state financial assistance flows to parents of students in sectarian nonpublic schools.

1. Minnesota Statutes §290.09 Subd. 22 does not reflect a secular primary purpose and, therefore, does not meet the first test of constitutionality outlined by this Court in Lemon v. Kurtzman, 403 U.S. 602 (1971).

The difficulty of demonstrating that a legislative body has other than a secular legislative purpose when it passes acts dealing with education in church-

operated and church-controlled elementary and secondary schools without maintaining a detailed, accurate legislative history is granted. It is further granted that, generally, legislative bodies make their own determinations on the issue of constitutionality of their acts and that the courts should usually assume prima facie constitutionality. However, Minnesota Statutes §290.09 Subd. 22 must be considered an exception to the rule.

The Minnesota statute in question is yet another in a long series of attempts by state legislatures, under tremendous pressures from sectarian lobbies, to assist financially hard pressed sectarian schools and avoid this Court's establishment clause tests.

In tort law it is assumed that a person intends the foreseeable results of his action. In this case it becomes evident that the legislators were able

clearly to foresee the results of their action. It is, therefore, logical to assume that in this non-tort situation the legislators intended -- i.e. purposed -- those results.

The legislature could not have been oblivious to the fact that, with few exceptions, public elementary and secondary schools do not charge tuition. It is equally obvious that the elementary and secondary schools which do charge tuition are primarily nonpublic and that those nonpublic schools are overwhelmingly sectarian. The making of an inclusive class of all parents of children enrolled in elementary and secondary schools becomes a farce and a subterfuge when one knows, as the legislators did, that almost all of those who would be able to profit from a tax deduction under §290.09 Subd. 22 would be parents of children enrolled in nonpublic sectarian schools.

Such transparent actions of a state legislature cannot stand up to the close judicial scrutiny required by the First Amendment religion clauses. Whatever the stated purpose, the evident purpose of the Minnesota legislature was to make indirect financial aid available to a predominately sectarian group of elementary and secondary schools. That evident purpose renders §290.09 Subd. 22 unconstitutional. See Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 780 (1973).

2. Minnesota Statutes §290.09 Subd. 22 does not satisfy the "primary effect" test also described in Lemon v. Kurtzman, supra.

The purpose which the Minnesota legislature evidenced resulted in indirect public financial aid to a class of schools which is predominately sectarian. As such, the tax deductions provided serve to advance religion.

Because this is the principal or primary effect of §290.09 Subd. 22, it is a clear violation of the establishment clause.

The class of schools which charge tuition and to which a taxpayer must pay tuition in order to claim a tax deduction is overwhelmingly sectarian, the instruction in those sectarian schools is impregnated with sectarian religion, and the tax deduction is based on tuition already paid. Parents of children in predominantly sectarian schools are rewarded by preferential tax treatment for the sole reason that they have paid tuition to a largely suspect class of nonpublic institutions. This can only have the principal or primary effect of aiding religion. To claim that indirect aid is not aid is specious reasoning and is contrary to the holdings of this Court.

> [I]t is the use to which public funds are put that is controlling. . . . What may not be

> done directly may not be done indirectly lest the Establishment Clause become a mockery. [emphasis added] Abington v. Schempp, supra, at 230 (Douglas, J., concurring).

It is correct that this Court did permit aid to parents and students in Everson v. Board of Education, 330 U.S. 1 (1947) and Board of Education v. Allen, 392 U.S. 236 (1968), but in these cases the class of students was broad and the aid provided -- transportation and state-approved textbooks -- was ideologically neutral. In the case at bar the opposite prevails. The class is predominantly sectarian and the aid -- tuition assistance -- is not ideologically neutral. The effect, therefore, is an affront to the establishment clause and cannot stand.

> The prohibition against establishment of religion cannot be circumvented by a subsidy, bonus or reimbursement of expense to individuals for receiving religious instruction and indoctrination.

Everson, supra, at 24 (Jackson, J., dissenting).

3. Minnesota Statutes §290.09 Subd. 22 engenders excessive entanglement between government and religion.

This Court enunciated the doctrine of excessive entanglement of government with religion in Walz v. Tax Commission, 397 U.S. 664 at 674 (1970), to set some standards for constitutionally permissible church-state interactions under the establishment clause. The doctrine was elaborated in Lemon v. Kurtzman, supra, as was the distinction between administrative and political entanglement. Either excessive administrative or political entanglement between the state and religion will render a statute unconstitutional. This Court in Essex v. Wolman, supra, and Committee for Public Education and Religious Liberty v. Nyquist, supra, further emphasized the constitutional necessity to avoid excessive entanglement

of government with religion. Section 290.09 Subd. 22 provides indirect public financial assistance to sectarian elementary and secondary schools. Financial assistance of this type must result in excessive entanglement of government with religion.

Essex v. Wolman, supra, stated that the criteria for determining administrative entanglement as a result of aid given to religious schools are: (1) the use to which the aid is put, (2) the form in which the aid is provided, (3) the person or institutions to which the aid is directed, and (4) the extent to which the state must intervene to determine that the aid is spent constitutionally -- i.e. for secular purposes.

We have shown that tax deductions were largely provided to parents of children in sectarian schools -- which overwhelmingly dominate tuition charging

schools in Minnesota -- and were tied to tuition actually paid to them. The aid was given in the form of tax deductions which appear to be almost identical with the type of indirect aid to sectarian elementary and secondary schools declared unconstitutional by a three judge court in Kosydar v. Wolman, 353 F.Supp. 744 (S.D. Ohio 1972), aff'd sub nom Grit v. Wolman, 413 U.S. 901 (1973). This Court has held that the use of a conduit to provide indirect financial assistance does not cure the constitutional defects of such assistance. Essex v. Wolman, supra. The first three Essex criteria for determining excessive administrative entanglement, when applied to Minnesota Statutes §290.09 Subd. 22, show that this Section does produce excessive administrative entanglement.

On its surface §290.09 Subd. 22 provides for less direct state

administrative intervention in sectarian elementary and secondary schools than have previously invalidated attempts to aid such schools. However, if public financial assistance is given either directly or indirectly for any purpose, it is axiomatic that those who supply the aid and those who receive it must be held accountable. Basic canons of public policy and responsibility are involved.

It is this fourth Essex criteria for excessive administrative entanglement which presents the legislatures with a dilemma from which they will find it difficult to extricate themselves either legally or logically. In Lemon v. Kurtzman, supra, and DiCenso v. Robinson, 403 U.S. 602 (1971), it was held that the administrative rules established were such that the government was excessively entangled with religion. Ohio's legislature then passed a tuition

reimbursement act which is analogous to the act challenged in this case. In Ohio a portion of tuition paid to an almost identical class of schools was returned to parents who had children enrolled in those schools. No restrictions were set by the state to guarantee that the reimbursed tuition money would be spent for non-religious purposes. This lack of administrative control was held to be a defect by a three judge court in Essex v. Wolman, supra:

> The parent has voluntarily undertaken an obligation to pay tuition to a non-public school and the school in return has agreed to educate that child in an atmosphere oriented, if not dominated, by the teachings of a specific religion. At the end of the transaction, the parent has applied for and received reimbursement from the State . . . solely and specifically because he has paid that sum to the denominational school. . . . Since the parents in this scheme serve as mere conduits of public funds, the State retains a responsibility of insuring that the public moneys thus provided and which retain

> their public character throughout the transaction, are used for constitutionally permissible ends and continue to be so used. [emphasis added].

Thus, statutes providing financial assistance to sectarian elementary and secondary schools that are drafted to prevent administrative entanglement are in themselves constitutionally defective because they do not then incorporate sufficient administrative controls to insure that the assistance is used for strictly secular purposes.

> . . . any general purpose aid, lacking non-entangling restrictions on use, constitutes an almost per se violation of the Establishment Clause. Id., at fn. 20.

Section 290.09 Subd. 22, we submit, is defective in this sense also.

Minnesota Statutes §290.09 Subd. 22 fails to satisfy the established criteria for avoiding excessive administrative entanglement; the political entanglement

which this section of the code generates is an additional defect.

In a separate concurring opinion in Walz v. Tax Commission, supra, Justice Harlan emphasized that the Court must look closely at legislation challenged as giving rise to excessive entanglement between government and religion to see if that legislation avoids the "risk of politicizing religion" and "political fragmentation on sectarian lines." 397 U.S. at 695.

In Lemon v. Kurtzman, supra, the Court, in addressing itself to the excessive entanglement caused by political division along religious lines said that though ordinarily

> . . . political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government . . . political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. . . .

> The potential divisiveness of such conflict is a threat to the normal political process. . . . To have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. . . . Here we are confronted with successive and very likely permanent annual appropriations which benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines are thus likely to be intensified. 403 U.S. at 622-623.

While Minnesota Statutes §290.09 Subd. 22 does not involve annual appropriations, it almost guarantees that political fragmentation and divisiveness on religious lines will be intensified. The amounts of money allowed to be deducted from gross income for Minnesota tax purposes are subject to annual review. If this part of the Minnesota Statutes is allowed by this Court to stand, demands on the political system for increased aid will intensify and divisive religious confrontations would periodically ensue.

As we have said, the schools indirectly given public financial assistance are decisively sectarian. There is a direct relationship between the degree to which a class is sectarian and the degree of entanglement that results. If a class receiving public financial assistance is decisively sectarian, it is essential that the element of entanglement be closely scrutinized. The statute involved in the case at bar does not stand that scrutiny. Inevitable political entanglement at an unconstitutional level is manifest.

4. Minnesota Statutes §290.09 Subd. 22, by providing indirect public financial assistance to sectarian elementary and secondary schools, involves the State in a form of compulsory religion.

The principle of religious liberty antedates the American republic and abhors compulsory religion. Roger Williams wrote: "Forced worship is a stinck [sic] in the nostrils of God" (The Bloudy

Tenent of Persecution); and Thomas Jefferson wrote in the Virginia Statute of Religious Liberty: ". . . no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief" (Sec. II). This is a part of the philosophy bound up in the religion clauses of the First Amendment.

The U.S. Court of Appeals for the Eighth Circuit, in affirming the constitutionality of §290.09 Subd. 22, gave its approval to a scheme which permitted indirect public financial assistance to sectarian elementary and secondary schools. The statistics quoted above and elaborated by Petitioners show that parents of children enrolled in sectarian schools received an overwhelming prepon-

derance of the tax deductions taken under §290.09 Subd. 22. These schools teach sectarian religion throughout their entire academic curricula. The aid to sectarian elementary and secondary schools comes from tax deductions for tuition already paid and constitutes funds which are subject to state control. When public funds, which are collected from all taxpayers regardless of religious belief or lack of religious belief, are used to aid, either directly or indirectly, elementary or secondary schools which teach religion, all taxpayers are compelled to assist in the support of that teaching of religion. State-coerced financial support of religion is one of the oldest and purest forms of the establishment of religion and is clearly at odds with the establishment clause of the First Amendment.

CONCLUSION

The decision by the U.S. Court of Appeals for the Eighth Circuit in the instant case should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John W. Baker, certify that on December 9, 1982 I mailed first class postage paid three copies of the foregoing Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae to each of the following Attorneys of Record in this case:

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